United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original 76-7632

To be argued by
PAUL T. REPHEN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

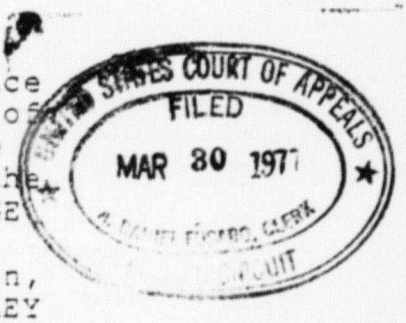
JOSEPH A. LOUGHRAN, JR.,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, individually, as Police Commissioner of the Police Department of the City of New York, and as Executive Chairman of the Board of Trustees of the Police Pension Fund, Article II, GEORGE McCLANCY, individually, and as Administrative Officer, Medical Section, New York City Police Department, STANLEY AUGUST, individually, and as District Surgeon of the New York City Police Department,

Defendants-Appellees.



APPELLEES' BRIEF

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Preliminary Statement

In this action, commenced pursuant to 42 U.S.C. §§1983 and 1985, wherein plaintiff challenges the constitutionality of section 22/2.1 of the New York City Police Department's Rules and Procedures as well as its application to him in this instance, and in addition seeks $250,000 in damages, plaintiff appeals from a decision of the Distict Court for the Eastern District of New York (Mishler, Ch. J.) which granted defendants' motion for summary judgment.

Questions Presented

1. Does section 22/2.1 of the Police Department's Rules and Procedures, which requires a police officer on sick report to remain in his residence unless he receives permission to leave it, violate plaintiff's right to travel or liberty?

2. Assuming the answer to the first question is negative, was the regulation applied to plaintiff in an arbitrary and capricious manner so as to deprive him of his due process rights?

Facts

Plaintiff was appointed a police officer with the New York City Police Department in February, 1963 (39)*. In May, 1965 he suffered a line of duty back injury (76). Due to his lower back condition he was, on December 29, 1972, assigned to restricted duty (76). An officer on restricted duty is given an assignment with restrictions recommended by his district police surgeon, consistent with his medical condition (75). Such an assignment involves a full day's work, generally at a desk job close to the officer's home (75). For all practical purposes, plaintiff performed no regular duty since July, 1974 (76).

On February 6, 1975 plaintiff was placed on sick report (77). An officer on sick report is considered

*Unless otherwise indicated, numbers in parentheses refer to the pages of the Joint Appendix.

too ill to perform even a limited assignment on restricted duty (76). Although he performs no duty, an officer on sick report continues to receive his full salary and all other benefits (76). Every member of the force enjoys unlimited sick leave (76).

From the time he went on sick report in February, 1975 to his retirement in June, 1976, plaintiff was on virtually uninterrupted sick report and performed no duties for the Police Department (77). The only exceptions to his being on uninterrupted sick report were in February and March, 1975, when he reported for restricted duty on two occasions, only to return to sick report within two days of both dates (77).

On April 13, 1976 he reported for restricted duty and objected to the proposed tour of duty. On April 14, 1976 he again returned to sick duty where he remained until his retirement on ordinary disability in June, 1976 (77,92). While on sick leave, plaintiff visited defendant August approximately once a week in order to determine whether he was fit to perform any duty (74).

Section 22/2.1 of the Department's Rules and Procedures prohibits police officers on sick report from leaving their residences. However, the commanding officer of the Department's Medical Section, who is responsible for the administration and supervision of members of the Department who are on sick report, may establish hours during which an officer on sick report may

leave his residence (75). The commander of the Medical Section during the period in question was defendant George McClancy. A district police surgeon may also, pursuant to Section 22/2.1, establish hours when an officer may leave his residence when such leave is necessary for medical purposes (75). In addition to the established hours during which an officer on sick report is permitted to leave his residence, an officer on sick report may, at other times, receive permission for good cause by telephoning the Police Department's Central Sick Desk (76).

When plaintiff went on sick report in February, 1975 he was initially granted permission to leave his residence for three hours a day (99). Subsequently, this permission was increased by Dr. August to a total of five hours a day between 11:00 A.M. and 2:00 P.M. and 6:00 P.M. to 8:00 P.M. (99).

He was also granted eighteen of his twenty-one requests to the Central Sick Desk for special permission to leave his residence (77). Requests were granted to enable plaintiff to visit his children; attend a funeral of a member of the Department; visit his lawyer; appear as a witness at a Departmental Trial; attend a meeting of Alcoholics Anonymous; visit his father in the hospital; get meals; attend a P.B.A. football testimonial dinner; meet a real estate broker about an apartment; attend a Police Department football game in Hempstead, Long Island (77-78).

He was refused the following requests: On April 16, 1976 he was denied permission to leave his residence in order to get therapy because of the lateness of the hour (8:30 P.M.) and because it was Good Friday; On April 18, 1976 he was refused permission to accompany the Police Department football team to a game in Atlanta, Georgia; On April 19, 1976 he was denied permission to attend a meeting of Alcoholics Anonymous because the Department had no record of his ever attending such a meeting previously, or that he was ever a member of that group or any other Departmental counseling group (78). A later request to attend an Alcoholics Anonymous meeting was, however, granted (78).

In addition, Dr. August also granted at least ten special reguests for permission made by plaintiff, for various reasons, including visits to his children and to see his lawyer (81). In all, out of a total of thirty-one requests to leave his residence twenty-eight were granted (81).

In November, 1975 defendant August recommended that plaintiff was capable of returning to restricted duty (81). However, plaintiff refused to return to such duty, alleging that his recurrent back injury prevented him from performing any kind of work (40).

In February, 1976 defendant McClancy became aware that plaitniff was the head coach of the Police Department's

Football Team (78). Believing that such activity was inconsistent with plaintiff's claim of a totally disabling back injury, and further believing that plaintiff should be prevented from engaging in athletic activities which could hinder his return to active duty, Captain McClancy ordered Dr. August to reduce plaintiff's permission to leave his residence from five hours daily to two hours daily (1:00-2:00 P.M. and 7:00-8:00 P.M.) (78). Dr. August complied, and the reduced hours became effective on March 12, 1976 (15). Throughout his period on sick report, plaintiff continued to remain as head coach of the Department football team (81).

During the period he was on sick report, plaintiff was subject to a number of Departmental charges. On July 14, 1975, the Department preferred charges and specifications against plaintiff for requesting and taking seventeen days vacation time to which he was not entitled (80). He was found guilty of those charges and was fined forty days salary and placed on probation for one year (80). On at least seven other occasions, charges and specifications were preferred against him for leaving his residence without permission between August, 1975 and April, 1976 (80).

Plaintiff commenced this action in April, 1976 seeking to enjoin the enforcement of section 22/2.1 of the Rules and Procedure,and $250,000 in damages. Subsequently, on June 25, 1976, plaintiff was retired from the Department

and that part of the suit seeking injunctive relief was withdrawn.

The Court below granted defendants' motion for summary judgment (116).

Opinion Below

In granting defendant's motion for summary judgment Chief Judge Mishler stated:

Whether the restrictions imposed are a constitutionally impermissible abridgement on plaintiff's right to travel is the threshhold question that must be examined. While the right to travel has repeatedly been recognized as a basic constitutional freedom, Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1971), Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1968), its exercise is not without certain limitations. The proper standard against which any limitation must be evaluated, in assessing its validity under the due process clause, is a function of the cost the restriction may tend to impose on the exercise of the right. Only when the restriction serves to "penalize" the practice of this constitutional freedom must the state proffer a compelling reason in order to justify the infringement. Memorial Hospital v. Maricopa County, 415 U.S. 250, 257-258, 94 S.Ct. 1076, 1081 (1974).

Loughran alleges that the restriction imposed by Department officials resultingly precluded his participation in necessary physical therapy and rehabilitation pro-

grams. Facially, plaintiff's allegations implicate the denial of a "necessity" that might be construed a "penalty." Memorial Hospital v. Maricopa County, supra at 259, 94 S.Ct. at 1082. The terms of confinement, allegedly imposed under the threat of penalty or dismissal, arguably extracted a price on the free exercise of the right to travel, i.e., the denial of medical treatment. At first blush, therefore, it would seem that a compelling state interest must be shown if the restrictions are to be found constitutionally permissible.

Yet we must remain mindful of the capacity in which plaintiff brings this suit. Loughran seeks the court's protection not as an ordinary citizen, but as an employee of the New York City Police Department. The distinction is a marked one, for the City, as an employer, retains unique interests in regulating the activities of its own employees that are simply not evident with the regulation of the general populace. Kelley v. Johnson,_____ U.S. _____, 96 S.Ct. 1440, 1444-45 (1976), citing Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). All department members enjoy unlimited sick leave with full pay. A restriction on the permissible number of annual days, evident in most police departments across the nation, is not imposed on New York City officers. Accordingly, some restrictions on the activity of a member on sick report are wholly necessary if malingering is to be

minimized and abuse curtailed. Gissi v. Codd, 391 F.Supp. 1333, 1336 (E.D.N.Y. 1974). Department officials should rightly have available an effective means by which to verify the legitimacy of an officer's disability claim and the necessity for his absence from duty. The subject promulgation is directed at this end; the purpose it serves is to ensure that a disabled member performing no duty does not partake in activity that is inconsistent with his status and which might undermine his expeditious return to service.

The uniqueness of the City's interests and its consequent choice of alternatives by which to protect those interests are entitled to a presumption of legislative validity. Kelley v. Johnson, 96 S.Ct. at 1445-46. Traditionally, government agencies have been granted the widest latitude in the dispatch of its own affairs. Rizzo v. Goode, _____ U.S. _____, 96 S.Ct. 598, 608 (1976). Hence, the compelling-state-interest test, which would be properly employed in the context of a civilian complaint, should play no part where the challenge is by a city employee and is directed at an agency's internal policies. Rather, the proper standard of evaluation, in keeping with the caveat that warns against judicial intervention into administrative policy making is whether the promulgation enacted ". . . is so irrational that it may be branded 'arbitrary', and therefore a deprivation . . ." in due process terms of Loughran's consitutional right to travel. Kelley v. Johnson, 96 S.Ct. at 1446.

The rationality of the subject restriction can hardly be questioned. The city, in affording the most liberal sick leave benefits to its police officers, maintains a scheme riddled with potentialities for abuse. Department officials are faced with a multi-dimensional management problem. Not only must they track the individual rehabilitative progress of the disabled member and foster his expeditious return to duty, but they must, in the larger context, encourage Departmental efficiency and soothe the additional burdens imposed on working officers caused by their colleague's absence. As such, the regulation serves to promote morale by minimizhng "gold-bricking" thereby assuring that each officer carries his fair share of the workload. Moreover, although the government's interest in maintaining fiscal integrity, by itself, is not decisive of due process claims, we must be cognizant of the strangulating financial conditions that prevail. Siletti v. New York City Employees' Retirement System, 401 F.Supp. 162, 168 (S.D.N.Y. 1975). [affd. in open court, _____ F. 2d _____ (2d Cir., March, 1977)]. Each city agency owes a duty to the public to avoid wasteful spending and provide competent services. We find, therefore, the subject restriction to be manifestly reasonable.

Considering, as we must, the burden imposed on plaintiff in having to abide by the terms of the Department's order, we can only conclude that in light of the

legitimate state interest intended to be served by the promulgation, it cannot be said to facially have violated Loughran's substantive due process rights. It does not appear from the evidence that plaintiff's therapeutic opportunities were substantially impeded by the operation of the regulation. When Loughran was intitially authorized to depart his residence three hours a day, he argued that it did not permit the daily walking and swimming that his condition required. Yet Loughran offered no reason why the permitted hours were insufficient beyond his flat assertion. Mere walking does not require wide open terrain, and a short term daily swim could easily have been fit into his non-regimented schedule.

Loughran was seen weekly by the district surgeon who must have been acutely familiar with Loughran's medical progress. Dr. August was clearly in a position to evaluate plaintiff's rehabilitative needs and authorize an accommodating schedule. However, he found Loughran capable of returning to restricted duty, a determination later confirmed by plaintiff's private physician, after he consulted with Dr. August in April, 1976. Other than plaintiff's bald assertion that the proffered duty assignment was not 'consistent with any rehabilitative schedule' (complaint ¶30), no concrete reason is offered for Loughran's failure to return to restricted duty. If he could as coach simply stand and direct player activity during a Department foot-

ball team practice, assuming that is all he did, little reason exists why he could not perform stressless administrative services that restricted duty would entail. Moreover, his return to retricted duty would have ended the terms of the Department order confining him to quarters rendering him free to engage in whatever rehabilitative program he wanted during off duty hours.

Plaintiff's claim that a compelling-state-interest test must be applied in assessing the regulation's constitutional validity is without merit. Loughran tries to distinguish Kelley arguing that there only the contours of the fourteenth amendment were implicated by the Police Benevolent Association's challenge to department 'hair regulations', and not the more fundamental rights like the one at issue here. While the Court in Kelley did admit that the liberty interest in matters of personal appearance was distinguishable from more fundamental rights such as those of procreation, marriage and family life, and that it was still an open question as to whether grooming choices were protected by the fourteenth amendment, the Court did assume for decision purposes that it was a right falling within the protections of the due process clause and announced the "irrational-arbitrary" test accordingly. Kelley v. Johnson, 96 S.Ct. at 1444.

Plaintiff's reference to Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967), in support of his contention

that certain constitutional rights cannot be conditioned by the exaction of the price of employment, is inapposite. While we agree that the state cannot condition employment on the relinquishment of constitutional rights, this does not mean that they may not impose restrictive regulations that satisfy requirements of substantive due process. The Court made it perfectly clear in Kelley that its language in Garrity suggesting the "policemen . . . are not relegated to a watered down version of constitutional rights", Garrity v. New Hersey, supra at 500, 87 S.Ct. at 620, did not mean that the claim of a city employee must be treated on the same consitutional plane as a private citizen's challenge. Kelley v. Johnson, 96 S.Ct. at 1446. The dichotomous use of dual standard of analysis, the choice of test depending upon the character of the challenger, is wholly justified by the unique interests surrounding the regulation of a city employee. The methods employed by the Police Department, therefore, should not be the subject of unnecessary judicial scrutiny when the court is not in the position to weigh policy arguments in favor and against the regulation. The Department should be given reins to choose the managerial system it wants, as long as a rational basis is shown, without judicial oversight and intervention into its disciplinary affairs. We find, therefore, that Department officials, having shown a rational basis for the implementation of the subject restriction, have not violated Loughran's sub-

stantive due process rights.

Loughran alternatively argues that resort to summary confinement procedures, enabling Department officials to side-step the more burdensome hearing requirements mandated when dismissal is sought for malingering, violates plaintiff's rights to procedural due process. Plaintiff contends the absence of procedural safeguards, regardless of how attractive the ends served by the restriction, is per se unconstitutional. Confinement under the threat of penalty or dismissal, it is argued, may not be constitutionally effected at the particular whim of either the district surgeon or medical section commander. Plaintiff's contentions must be rejected.

What serves to satisfy the requirements of procedural due process in any given case depends upon the nature of the proceedings involved and the rights therein the may be affected. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961); Silett[illegible] v. New York City Employees Retirement System, supra at 167. Whereas minimum requirements demand notice and some sort of review. Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729 (1975), it by no means follows that a trial type hearing is required. Surely no such proceeding is necessary where it is of questionable benefit.

To argue, as plaintiff does, that implementation of the confinement order is permeated by whimsical decision making is shortsighted. Loughran, who was examined by the

district surgeon weekly, had his case reviewed after each visit. Clearly Dr. August was in the best position to evaluate plaintiff's medical progress and appreciate his rehabilitative needs. The five hours leave initially authorized represented a balance between the need to promote Loughran's expeditious return while providing him free time to pursue a rehabilitative schedule. The schedule was not rigid; additional time was allowed plaintiff to receive private treatment from his outside physician. Only a single request for emergency leave to undergo therapy was denied, and the circumstances surrounding that request were suspect. Moreover, Loughran was permitted and in fact did challenge Dr. August's determination with letters from his private physician. To argue that weekly review of plaintiff's case was anything but manifestly sufficient is unreasonable. A trial type hearing would serve no purpose where questions of credibility would not likely arise, where plaintiff's interest in cross-examination was minimal, and plaintiff failed to show just what additionally he would be able to prove if afforded a hearing. Siletti v. New York City Employees' Retirement Association, supra at 167-168.

Loughran's allegation that defendant McClancy's unilateral decision in March, 1976 to further curtail his hours represented a capricious and constitutionally violative determination is likewise without merit. Well

before McClancy's order Loughran had been deemed fit to return to restricted duty. Yet plaintiff made no attempt to perform even the lightest of administrative duties; he continued to assert his inability to work. Quite inconsistently, however, Loughran saw himself fit enough to continue functioning as head coach of the Department football team. Even assuming these duties required no strenuous activity, plaintiff's claims appeared to be mutually exclusive. Hence, McClancy's suspicions were justifiably aroused. District Surgeon August seemingly agreed, and he issued the formal dictate. Their decision to impose more restrictive conditions can hardly be considered arbitrary when, less than one month later, Loughran's own personal physician conferred with Dr. August and agreed plaintiff was able to undertake light work.

Furthermore, plaintiff's procedural due process claim is wrongly premised. Loughran, in the true sense of the word, was not 'involuntarily' confined. He held the key to free movement; at any time he could have chosen to return to restricted duty and avoid the reaches of the subject provision. Plaintiff could only have been penalized or dismissed for violation of the confinement order.

If charges were brought, Loughran then would have been accorded a trial type hearing.* Such a scheme which provides for weekly review of a member's medical progress before the imposition of restrictions and for a trial type hearing when an officer is cited for violating a confinement order satisfies the requirements of procedural due process.

Accordingly, for all the reasons heretofore cited defendant's motion for summary judgment is granted and plaintiff's cross-motion for the same is denied.

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*Loughran was in fact cited seven times for violating the confinement order and complaints issued. A disciplinary hearing was originally scheduled in May, 1976, but was postponed pending decision on Loughran's retirement application. When plaintiff was granted an ordinary disability retirement, the matters were rendered moot.

RELEVANT SECTION OF THE RULES AND PROCEDURES OF THE NEW YORK CITY POLICE DEPARTMENT.

Section 22/2.1

> A member of the force on sick report shall not leave his residence or place of confinement except by permission of his district surgeon or for the purpose of visiting a police surgeon. The district surgeon concerned shall prepare Form M. B. 5 (Permission to Leave Residence While on Sick Report) in quadruplicate, indicating the day(s), date(s) and time(s) for which permission had been granted. Permission shall not be granted for a period longer than one week. Before granting a renewal of such authorization the district surgeon shall reexamine the necessity therefor. M.B. 5 shall be prepared each time permission is granted or renewed

ARGUMENT

SECTION 21/2.1 OF THE POLICE DEPARTMENT'S RULES AND PROCEDURES, WHICH PROHIBITS A POLICE OFFICER ON SICK REPORT FROM LEAVING HIS RESIDENCE WITHOUT THE PERMISSION OF A POLICE SURGEON, DOES NOT VIOLATE ANY OF PLAINTIFF'S CONSTITUTIONAL RIGHTS.

THE REGULATION WAS NOT ARBITRARILY OR CAPRICIOUSLY APPLIED TO PLAINTIFF SO AS TO DEPRIVE HIM OF HIS DUE PROCESS RIGHTS.

(1)

We have briefed the merits of plaintiff's various contentions. However, in light of the fact that plaintiff retired from the Police Department during the pendency of this action, his requests for injunctive and declaratory relief would appear moot. If we are correct in this view, since in a §1983 action damages cannot be obtained under these circumstances from the defendants in their official capacities, see Monell v.

Department of Social Services of the City of New York, 532 F. 2d 259 (2nd Cir, 1976), cert. granted, ____ U.S. ____ (1977), it would appear that the only issue properly before this Court is whether defendants engaged in action which they knew or should have known was violative of plaintiff's constitutional rights, or took such action with the malicious intention to deprive him of his rights so as to make them personally liable under section 1983. Wood v. Strickland, 420 U.S. 308, 322 (1974). On the facts of this case, we believe no serious claim can be made against these defendants in their individual capacities, and in plaintiff's brief no such claim appears to be urged.

Pursuant to collective bargaining agreements, each police officer on the New York City police force is entitled to unlimited sick leave with full pay and all benefits (39). Because of these very generous sick leave provisions, the Department considers itself obligated to encourage men on sick report to return to at least restricted duty as soon as possible (39). In order to achieve this goal and to discourage abuse, the Department promulgated section 22/2.1 of its Rules and Procedures.

Plaintiff argues that section 22/2.1 of the Rules and Procedures is unconstitutional on its face. He maintains that its application deprives him of his constitutional rights to travel and liberty. Such

rights, he argues, may not be infringed upon in the absence of a compelling state interest (Appellant's Br., pgs. 11-22).

This argument is without merit. Admittedly, the right to interstate travel has been recognized as a fundamental constitutional right. Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). A government may not deter or penalize the exercise of that right without a compelling reason. However, travel does not mean mere movement; it is the right to migrate with the intent to settle and abide. Memorial Hospital v. Maricopa County, 415 U.S. at 255; Cole v. Housing Authority of the City of Newport, 435 F. 2d 807, 810-811 (1st Cir., 1970); King v. New Rochelle Municipal Housing Authority, 442 F. 2d 646, 648 n. 5 (2nd Cir., 1971); Wellford v. Battaglia, 343 F. Supp. 143, 147 n. 9 (D.C. Del., 1972).

Obviously, the right to travel as defined by the Supreme Court and lower courts is not involved in this case. Section 22/2.1 does not constitute the type of direct purposeful barrier which penalizes the exercise of travel so as to trigger the compelling state interest test.

Moreover, it is noteworthy that plaintiff brings this challenge not as a member of the public at large, but rather, as an employee of the New York

City Police Department. It has repeatedly been held that a public agency's relationship with its employees may justify a greater limitation on their rights than on the rights of the general public at large. Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Kelly v. Johnson, 425 U.S. 238, 245 (1976); McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646 n. 6 (1976); United States Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Plaintiff cites Garrity v. New Jersey, 385 U.S. 493 (1967), in which the Court stated that policemen do not shed their civil or constitutional rights when becoming policeman (Appellant's Br. p. 11). In Kelly v. Johnson, supra, which concerned the right of a police department to impose hair length codes on its members, the Court took note of Garrity and stated at pgs. 248-249:

> "Garrity of course, involved the protections afforded by the Fifth Amendment to the United States Constitution as made to the States by the Fourteenth Amendment (citation omitted). Certainly its language cannot be taken to suggest that the claim of a member of a uniformed civilian service based on the 'liberty' interest protected by the Fourteenth Amendment must necessarily be treated for constitutional purposes the same as a similiar claim by a member of the general public."

In a case where an individual, as a public employee, alleges that a constitutionally protected interest is being infringed upon by a competing interest of a governmental body, as an employer, determination of the lawfulness of the restriction or requirement will depend upon whether there is a rational relationship between the regulation challenged and some legitimate end sought to be achieved by the government, and not upon any other test. Kelley v. Johnson, 425 U.S. at p. 245; Singer v. United States Civil Service Commission, 530 F. 2d 247 (9th Cir., 1976); Paulos v. Breier, 507 F. 2d 1383 (7th Cir., 1974).

Plaintiff asserts that the rational purpose or balancing test set forth in Kelley and other cited cases applies only where the right sought to be protected "implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment" (Appellant's Br., p. 14). He further argues that the interest involved herein is fundamental. Plaintiff is incorrect on both points. In the first place, no fundamental interest is involved in this case. "Where [an] employee asserts that his right is protected by the general ambit of the Fourteenth Amendment, the state need only show reasonableness". Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F. 2d 1264, 1266 (7th Cir., 1976). Moreover, in United States Civil Service Commission v. National Ass'n. of Letter Carriers and Broadrick v. Oklahoma,

supra, the Court sustained comprehensive and substantial restrictions upon the First Amendment rights of public employees without examining the question of a compelling state interest. Similiarly, in McCarthy v. Philadelpia Civil Service Commission, supra, the Court did not require that a compelling state interest be shown when it sustained Phildelphia's residency requirement for employment with that City's government.

Plaintiff also cites a number of decisions of this Court which required the state to show more than a reasonable basis when it has restricted the rights of prison inmates (Appellant's Br., pgs. 11-13). He seeks to apply those cases to the case at bar. However, his situation was in no way similar to that faced by prisoners.

Inmates are involuntarily under the total control of the state. Plaintiff, on the other hand, voluntarily chose to become a member of the Police Department, and then chose to avail himself of a contractual benefit granting him unlimited sick leave.

The Court below properly recognized the need for section 22/2.1. In his opinion Judge Mishler stated:

> "The rationality of the subject restriction can hardly be questioned. The city, in affording the most liberal sick leave benefits to its police officers, maintains a scheme riddled with potentialities for abuse. Department officials are faced with a

> multi-dimensional management problem. Not only must they track the individual rehabilitative progress of the disabled member and foster his expeditious return to duty, but they must, in the larger context, encourage Departmental efficiency and soothe the additional burdens imposed on working officers caused by their colleague's absence (108)."

The court in Gissi v. Codd, 391 F. Supp. 1333 (E.D.N.Y., 1974), likewise recognized its need when it stated at 1336:

> "Some restrictions on the activitity of a man on sick leave are justifiable in order to prevent malingering or abuse. The Police Department should be in a position to verify whether plaintiff's absence from his residence is for a legitmate purpose and consistent with his claim of total disability to perform even restricted duty."

Since this case does not involve fundamental constitutional rights, the Department need not, as plaintiff argues, demonstrate that there is no less restrictive alternative to Section 22/2.1. San Antonio School District v. Rodriquez, 411 U.S. 1, 51 (1972). Nevertheless, it may be pointed out that the only practical method by which the Department can insure efficiency and avoid abuse of the sick leave provision is by requiring those on sick report to stay at home.

Presumably, any officer who is on sick report and incapable of performing even restricted duty is suffering from a malady which requires him to stay at home. As has been pointed out, regular hours are usually established to allow an individual to leave

his residence for rehabilitation and recuperation, and special prermission is granted whenever there is good cause.

Plaintiff maintains that the Department may accomplish its goal of preventing malingering by bringing Departmental charges against malingerers (App. Br. pgs. 20-21). Of course, the Department can and does punish malingerers. However, the threat of such punishment is much less of a deterrent than Section 22/2.1 of the Rules, which imposes an entirely reasonable restriction on the officer's freedom to leave his home while he is availing himself of the Department's generous sick leave provisions.

A system which allowed police officers on sick report with full pay to go where they choose and when they choose would invited abuse. The Department should not be forced into adopting a position which encourages men to go on sick report rather than staying on full or restricted duty.

In any event, the methods chosen by the Police Department to encourage efficiency and discourage abuse of the benefit must rest in the discretion of the Department. It is a well established rule that governments have traditionally been granted the widest latitude in the dispatch of their internal affairs. Rizzo v. Goode, 423 U.S. 362 (1976); Kelley v. Johnson, at p. 247.

In light of the reduction in the size of the Police Department which has occurred because of layoffs, attrition and a hiring freeze, it is essential for the safety of the City's residents that the Department select the most effective methods of insuring that there will be an adequate number of police officers present for each tour of duty. It is incomprehensible to us how plaintiff can argue, as he does at page 16 of his brief, that Section 22/2.1 is not reasonably related to the promotion of the safety of the City's populace.

Plaintiff was never denied any of his protected rights. Had he waived his contractual right to salary and benefits for the period he was on sick report he would have been free to go where he chose. Instead, he took advantage of that very generous benefit, but sought to avoid the one condition which must be imposed if the Department is to avoid inefficiency and abuse.

(2)

Plaintiff alternatively argues that section 22/2.1 was applied to him in an arbitrary and capricious manner. He maintains that the absence of any guidelines to aid the police surgeon in determining the number of hours during which an officer on sick report may leave his residence, and the lack of availability of any administrative review of that decision deprived him of his

liberty without due process of law (Appellant's Br., p. 23).

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). See also, Morrissey v. Brewer, 408 U.S. 471, 481, (1972). In determining what process is due in a given circumstance, the factors which must be taken into consideration include the nature of the right or interest threatened, the administrative burden which would be imposed by requiring review, and the severity and consequences of the governmental action. See, Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976); Hagopian v. Knowlton, 470 F. 2d 201, 207 (2nd Cir., 1972).

If the actions taken by the defendants affected plaintiff's constitutional rights, the effect was only minimal. As noted above, he was required to stay at home only because he purposefully availed himself of the unlimited sick leave provisions.

An examination of the cases cited by plaintiff on this point indicates that they were concerned with the deprivation of either First or Fourth Amendment Rights. This is not without significance since the requirements of due process become more demanding when the issues concern fundamental rights. In the instant case, the right plaintff claims was infringed is not fundamental, but rather one which at best comes only within the general ambit of the Fourteenth Amendment.

In a police force of more than twenty thousand officers, the absolute number of men on sick report at any given time can be large. If each officer on sick report had the right to seek administrative review of the number of hours during which he has been given permission to leave his residence, an additional administrative burden would be placed on an already strained Police Department. In light of the de minimis effect which the section has on the rights of officers, the Department should not be required to establish additional administrative machinery to process a new type of appeal.

The court below correctly noted that a review in this case would accomplish little since the essential facts are not in dispute (114). Plaintiff has not demonstrated that the decisions of the defendants were in error.

He was originally allowed three hours a day during which he could leave his residence. At his behest this time was increased to five hours daily so that he could have more time for rehabilative activities. Surely, the five hours a day was sufficient to meet his needs, and plaintiff does not dispute this fact. In addition, twenty-eight out of thirty one requests for special permission to leave his residence were granted to him.

Only when Captain McClancy discovered, in

March of 1976, that plaintiff was coaching the Department's football team did he order the three hour reduction in plaintiff's free hours. Dr. August did not dispute McClancy's directive. On the contrary, Dr. August had been recommending that plaintiff be returned to restrictive duty since the previous November. Plaintiff does not deny that he was coaching the football team during the period he was on sick report. Moreover, in April, 1976, Dr. August and plaintiff's private physician conferred on his status and apparently agreed that he was capable of performing restricted duty (16). Based on these facts, we fail to see what administrative review could have accomplished in this case.

Plaintiff's contention that defendants made their decisions in a whimsical fashion is specious and totally without support in the record (Appellant's Br., p. 27). During the more than one year during which he was on sick report, plaintiff was examined on an approximately weekly basis by Dr. August. The Police Surgeon was well aware of plaintiff's physical condition when he recommended a return to restrictive duty in November, 1975.

McClancy's decision to reduce the permissible hours away from home was not arbitrary in light of plaintiff's coaching activities, his conviction following a departmental trial for stealing vacation time, and the seven departmental charges facing him at the time for being away from his residence without permission.

McClancy and August had good reason to believe that plaintiff was engaged in activities which were inconsistent with his claim of a disabling back injury. Furthermore, in March of 1976, it had become apparent that plaintiff was abusing his sick leave privileges, and in order to discourage him from continuing this course of conduct, defendant reduced his permissible hours.

If plaintiff felt that the actions of the defendants were arbitrary and capricious, he possessed the right to challenge them in state court pursuant to CPLR Article 78. Plaintiff presents no meritorious federal cause of action. His rights would have been adequately protected in state court. See e.g. West Penn Power Co. v. Train, 522 F. 2d 302, 313 (3d Cir., 1975).

Equally without merit is his claim that there were no guidelines to aid Dr. August in establishing the hours during which he was permitted to leave his home. The setting of permissible hours involves a medical judgment which, of course, must vary from case to case. In establishing these hours, the police surgeon must keep in mind the Department's obligation to encourage men to report back to duty as soon as possible. As noted above, plaintiff did not demonstrate that the five hour free time granted to him was detrimental to his recuperation. Moreover, any guidelines established by the Department would surely provide for a reduction in the permissible hours when it is discovered that an

officer is engaged in activity which is inconsistent with his claim of a disabling injury.

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED, WITH COSTS.

Dated: March 25, 1977

Respectfully submitted,

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Attorney for Appellees,

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PAUL T. REPHEN,
of Counsel.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Allenton James being duly sworn, says that on the 30 day of March 19 77
at No. 148 Montague st in the Borough of Brklyn in New York City, he served a copy
of the annexed appellant's Brief upon Harold B. Jones, Jr. Lester Esq.,
the Attorney for the Plaintiff Appellant in the within entitled action, by delivering
a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 30
day of March 19 77 } Allenton James

Form 320-3M-123057(61)

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires May 1, 1978

James Burns